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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6965

PAUL WILLIAM JORDAN,

Petitioner

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

PAUL WILLIAM JORDAN,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered December 30, 1976.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, reported at ___ Ariz. ___, 561 P.2d 1224 (1976), is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on December 30, 1976. On March 22, 1977, that court denied a timely motion for rehearing. On May 4, 1977, the Supreme Court of the State of Arizona denied a timely motion for stay of execution. Jurisdiction of this court is invoked under 28 U.S.C. §1257(3) petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the decision of the courts below holding petitioner's confession voluntary substantially erodes this Court's doctrines relating to promise-induced confessions?

2. Whether Arizona's capital-sentencing procedure is constitutional under the Sixth, Eighth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Arizona Revised Statutes Annotated:

Ariz. Rev. Stat. Ann. §13-451 (1956)

> §13-451. Murder and malice aforethought defined.
> A. Murder is the unlawful killing of a human being with malice aforethought.
> B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Ariz. Rev. Stat. Ann. §13-452 (1973 Supp. Pamphlet)

> §13-452. Degrees of murder.
> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.

Ariz. Rev. Stat. Ann. §13-453 (1973 Supp. Pamphlet)

> §13-453. Punishment for murder.
> A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in §13-454.
> B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years.

Ariz. Rev. Stat. Ann. §13-454 (1973 Supp. Pamphlet)

§13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree.

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall have taken into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Ariz. Rev. Stat. Ann. §13-1654 (1956)

§13-1654. Method of infliction of sentence of death

The penalty of death shall be inflicted by lethal gas.

Ariz. Rev. Stat. Ann. §13-641 (1956)

§13-641. Definition

Robbery is the felonious taking of personal property in the possession of another from his person, or immediate presence, and against his will, accomplished by means of force or fear.

STATEMENT

This is a petition for a writ of certiorari to review a judgment of the Arizona Supreme Court affirming petitioner's death sentence. Petitioner, Paul William Jordan, was convicted of murder in the first degree after a jury trial in the Maricopa County Superior Court, and was sentenced by the trial judge to death by the administration of lethal gas.

I. Testimony at Trial

Mr. and Mrs. Abraham Osso owned and operated a grocery store in Tempe, Arizona. Mr. Osso was last seen alive by his wife on January 15, 1974, at approximately 3:20 p.m., T.(I) 73, 75-76,[1/] when Mrs. Osso left him alone in the store. Mrs. Osso testified that she thought her husband had approximately $800 in a wallet on his person which she described as tax money that Mr. Osso intended to deposit in the bank on the following day. T.(I) 74,77. When Mrs. Osso returned to the store at approximately 7:00 p.m. on January 15, 1974, her husband was dead.

Mr. Osso's body was discovered by a customer, Frank Russell, between 6:30 and 7:00 p.m. on the 15th. T.(I) 83, 87. Mr. Russell found Mr. Osso lying on the floor in the back of the store and, failing to arouse him, went for help. T.(I)83-84. Mr. Russell testified that he looked at the open cash register from a distance and saw no bills in the drawer, only coins. T.(I) 86, 91-92.

1/The transcript of the proceedings was prepared in four individually-numbered volumes: I - February 24, 1975; II - February 25, 1975; III - February 26, 1975; and IV - March and 13, 1975. References to the transcript ("T.") will reflect the volume and the page within that volume. References to the trial record will be indicated by "CR" followed by the page number.

The first policemen arrived at 6:48 p.m. and found Mr. Osso's body in the back room. T.(I) 93-94. The cash drawer was open and on examination was found to contain only coins and no bills. T.(I) 94. The policemen checked the body, finding a small wound and no vital signs. T.(I) 96. The policeman who first on the scene testified that he found no blood in the front of the store or in the vicinity of the cash register. T.(I) 97. The case was turned over to the Tempe Police Department Investigation Division.

On January 17, 1974, petitioner was apprehended in Las Vegas, Nevada by Dale Olson of the Las Vegas Police Department, who testified at trial that he "came in contact" with petitioner at a parking lot in Las Vegas and that petitioner had a car and $480.00 in cash. T.(I) 110-111. Olson further testified that petitioner, who was accompanied by a woman, was carrying hotel room keys. T. (I) 111. Olson went to petitioner's rooms and found two juveniles (Shortnacy & Russell), two guns and $289 in a wallet. T. (I) 112. The wallet was found under the mattress in the room in which the juveniles were sleeping. T. (I) 115. One of the guns was found in a nightstand next to the bed. T. (I) 117. Olson impounded the guns, the money in the wallet, and petitioner's car. T. (I) 115-116. He took petitioner into custody, along with the two juveniles and a Miss Caldwell.[2/] On January 23, 1974, extradition proceedings were held to transfer petitioner to Texas.[3/]

2/ There is no indication in the record of the reason why Olson originally stopped petitioner in the parking lot, or of the basis on which he searched petitioner and petitioner's hotel room. There was no evidence at that time connecting petitioner with the murder in Arizona. T. (II) 50. The wallet seized in Nevada was never examined by Arizona investigators or identified by Mrs. Osso. T. (II) 78.

3/ State's Response to Defendant's Motion to Dismiss for Want of Speedy Trial. CR. 69.

On March 7, 1974, the Tempe, Arizona police received a call from the Fort Worth, Texas police to the effect that someone in custody had information about a robbery and shooting in Arizona. T. (II) 50. The Fort Worth police put this individual (who is not named anywhere in the record herein) on the phone with Detective Schoenfeld of the Tempe Police. The informant told Schoenfeld that petitioner and Shortnacy had committed the Arizona crime. T. (II) 50-51. On the basis of this and other information given by the informant which tied into the investigation up to that point, Detective Schoenfeld obtained from the Weatherford, Texas,police the weapons seized from petitioner in Nevada. The guns were then examined by Arizona weapons experts. T. (II) 52-53.

According to Detective Schoenfeld's testimony, a criminalist with the Arizona Department of Public Safety eliminated one of the guns seized from petitioner as the one that fired the bullet removed from Mr. Osso's body. T. (I) 56. The other gun, which could not be excluded, was sent along with the bullet to the FBI for further testing. The FBI report concluded (T. (II) 55), as did the Arizona ballistics expert, that there could not be a specific positive identification of the gun with the bullet. However, the gun seized from petitioner could not be excluded as a possible source of the bullet. T. (I) 124. A fingerprint expert testified that petitioner's prints were not found at the scene. T. (II) 107.

The results of the ballistics tests and the informant's story led Detective Schoenfeld and Lt. Christensen of the Tempe Police Department to go to Weatherford, Texas on May 1, 1974,to interview petitioner. T. (II) 57. The Arizona policemen told petitioner what crime they were investigating and that his girlfriend, Nancy Caldwell, wanted to confess to the crime. T. (II) 58. Petitioner was advised of his rights. T. (II) 59.

Petitioner asked Schoenfeld and Christensen to have the Texas charges against him and Nancy Caldwell dropped. T. (I) 12, 37-38; T. (II) 61, 113. Schoenfeld called the Ft. Worth prosecuting attorney regarding the Texas charges against petitioner and was told that no charges would be dropped at that time. T. (I) 12; T. (II) 61-62, 114. However, petitioner testified without contradiction that charges in three other Texas cities were dropped. T. (II) 131. With regard to the charges against Miss Caldwell, the Tempe Police contacted the prosecuting attorney in Weatherford, a Mr. Tandy, and arranged a meeting at Tandy's office. T. (II) 63. Mr. Tandy met with petitioner and Miss Caldwell alone, the police remaining in the outer office. When the meeting was over, Tandy said that petitioner would talk to the police. T. (II) 64.[4/]

Prior to the meeting with Tandy, petitioner had asked the Tempe police if Arizona had a death penalty and was told that it did, but Lt. Christensen told petitioner that it was unlikely he would receive the death penalty because it hadn't been imposed recently. T. (I) 14, 28, 36, 38, 49; T. (II) 68, 116. Petitioner testified that he regarded Christensen's statement as one of fact rather than opinion, and that he would not have given a statement to the police if he had thought he would get the death penalty. T. (I) 45, 47; T. (II) 132-137. Petitioner testified that he was told he would get a life sentence in Arizona and would probably only have to serve 7½ years to be eligible for parole. T. (I) 43-44; T. (II) 132. Christensen also testified that he had told petitioner he wouldn't get the death penalty, though Schoenfeld testified that there was no discussion of specific terms and that no

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4/ Testimony is inconclusive as to whether Tandy actually said that Nancy Caldwell would be released and that Weatherford charges against petitioner would be dropped. However, Det. Schoenfeld testified that if his report reflected that Tandy said Nancy would be released, then that is probably what Tandy said. T. (I) 25. Schoenfeld also testified that Tandy said "that everything was squared away." T. (II) 64.

promises were made. T. (I) 13, 15, 29-30, 87.

After the meeting with Tandy, petitioner gave a statement implicating himself in the Osso robbery and murder. The Tempe police, with petitioner's knowledge,T. (II) 134, recorded the statement on tape and had it transcribed. Petitioner was advised of his rights again before taping. T. (I) 25. The typed statement was 13 pages long, and petitioner signed each page. T. (I) 6. Petitioner's statement was to the effect that he went into the store to buy cigarettes and, seeing money in the cash register, decided to rob the store. He took out his gun. Osso, behind the counter, refused to give petitioner the money. When Osso started to reach for his pocket, petitioner thought he was reaching for a gun and shot Osso.

At trial,petitioner testified that he was facing approximately 12 charges in Texas at the time of his confession and wanted to be extradited to Arizona rather than serve time in Texas. T. (II) 129-131. He was told that it was likely that he would be extradited to Arizona because the charge there was more serious. T. (II) 16; T. (II) 131. He testified further that he was likely to get a life sentence in Texas and wanted to avoid serving Texas sentences because of the lack of medical care in Texas prisons. T. (I) 45; T. (II) 133, 137. Petitioner repeatedly testified that he did not commit the Osso crime and only made his incriminating statement because of his impression that Texas charges would be dropped and that he would serve a relatively short sentence in Arizona. T. (I) 43-44, 47; T. (II) 129, 136-137, 141-142, 144.

II. Procedural History of the Case

Petitioner's statement was taken by Tempe, Arizona, police officers at the Weatherford, Texas, Police Department on May 1, 1974. On May 13, 1974, Arizona filed a complaint charging petitioner with murder, and a warrant was issued on that day. In June, 1974, petitioner was tried and convicted of aggravated robbery in Texas. On July 30, 1974, the Arizona Sheriff requested detainers against petitioner. On October 9, 1974, petitioner was convicted in Texas of robbery by assault, aggravated robbery (2 counts) and forgery.

On November 22, 1974, petitioner was brought before a magistrate in Texas to waive extradition to Arizona. On December 6, 1974, petitioner made his first appearance before an Arizona magistrate. He filed a financial statement and requested appointment of counsel. CR 5. On December 12, 1974, a Grand Jury in Maricopa County, Arizona returned an indictment against him for first degree murder. CR 1. He was assigned counsel from the Phoenix Public Defender's Office, and trial was set for January 24, 1975, but was subsequently continued for a month.

On January 31 and February 5, the State moved to add allegations of five prior Texas convictions of petitioner to the indictment. On February 18, 1975, the defense filed a Motion to Quash, or Dismiss for Want of Prosecution and Denial of Speedy Trial (CR 50) and a Motion to Suppress Confession (CR 61). On February 24, after a voluntariness hearing, the court denied both motions. T. (I) 52. Trial began with jury selection the same day.

Presentation of the evidence was completed on February 25, and a defense motion for directed verdict was denied. On February 26, the court instructed the jury as to the law of first degree murder and robbery. T. (III) 44-45. It gave the

State's requested instructions to the effect that in robbery-murder, the robbery is the legal equivalent of premeditation, and that all of the elements necessary to sustain a robbery conviction need not be proved to establish murder in the course of a robbery. T. (III) 45. It also gave the defendant's requested instruction regarding the voluntariness of a confession. T. (III) 46-47. The jury was instructed not to discuss or to consider punishment, T. (III) 47, and was given two forms of verdict: guilty of first degree murder, or not guilty. T. (III) 47-48. The jury returned a guilty verdict the same day.

On March 5, 1975, the defense filed a Motion for a New Trial contending inter alia, that the court had erred in failing to suppress petitioner's confession and in admitting the confession into evidence, CR 94. On March 12, 1975, a hearing in aggravation and mitigation was held, at which petitioner's motion for new trial was denied. T. (IV) 3. The State renewed its motion for addition of an allegation of prior convictions to the indictment. The court ordered that four Texas convictions (two of aggravated robbery and one of aggravated assault on October 9, 1974; and one of aggravated robbery on June 10, 1974)[5/] be added to the indictment as aggravating circumstances. T. (IV) 6. These convictions were proved by certified records which disclosed nothing about the facts of the Texas offenses. CR 30, 33, 35, 37, 40. The defense presented no witnesses or evidence in mitigation. Counsel asserted only that petitioner had made his statement to the police for the reasons described in his testimony, but had not committed the offense. T. (IV) 9. On petitioner's request for sentencing as soon as possible, the court set sentencing for March 13, 1975. T. (IV) 11.

5/ This June 10, 1974, conviction is misdated May 30, 1974 in the motion papers filed by the State, CR 16, 20, 23, 26.

On March 13, 1975, the court found two aggravating circumstances under Ariz. Rev. Stat. Ann. § 13-454(E)(1) and (2): petitioner had been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was imposable; and petitioner had been convicted of felonies in the United States involving the use or threat of violence on another person. T. (IV) 14. It found no mitigating circumstances under Ariz. Rev. Stat. Ann. § 13-454(F). T. (IV) 14-15. It accordingly sentenced petitioner to death by lethal gas. T. (IV) 16.

The Supreme Court of Arizona affirmed on December 30, 1976 and denied a timely motion for rehearing on March 22, 1977. It denied a petition for stay of execution on May 3, 1977; and, on May 31, 1977,it set an execution date of June 29, 1977.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. The Involuntary Confession Issue

As indicated in the immediately preceding section, petitioner's pretrial motion to suppress his confession as involuntary (CR 61) was denied after an evidentiary hearing (T.(I) 52), and this ruling was challenged as error in petitioner's new trial motion (CR 94), which was also denied (T.(IV)3). On appeal to the Arizona Supreme Court, petitioner argued that the confession was involuntary in a constitutional sense primarily because it was induced by a promise of law enforcement authorities to release Nancy Caldwell from custody and to drop charges against her and petitioner in Texas. Because petitioner had denied knowledge of the Osso crime until after these promises were made, petitioner argued that his subsequent confession was a direct result of the inducement. Appellant's Opening Brief on Appeal, at p.9.

The Supreme Court of Arizona found that "the promise not to prosecute in Texas, having been solicited by [petitioner] . . . did not render his confession involuntary." 561 P.2d at 1227 ; Appendix A, infra, at p. 4 . Following a 1970 Kentucky decision, the court approved the rule that an arrested individual who "himself initiated the 'deal' . . . by offering to confess if . . . charges were dropped" could not subsequently complain that his confession was the product of unconstitutional inducement. 561 P.2d at 1227. Appendix A, infra, at p. 4 . With regard to the interrogating officer's statement to petitioner that petitioner would probably not get the death penalty, the court

found that this pronouncement was "couched in terms of a mere possibility." 561 P.2d at 1227 ; Appendix A, infra, at p.4 . It was merely an opinion, not a promise. 561 P.2d at 1227; Appendix A, infra, at p. 4 . "[I]n the alternative, even were it perceived [by petitioner] . . . to be such a promise of leniency, it was not one relied upon by [petitioner] . . . in his decision to confess." Because petitioner had already stated that he would confess if the Texas charges against Nancy Caldwell and himself were dropped. 561 P.2d at 1227 ; Appendix A, infra, at p. 4. Accordingly, "the trial court's determination that [petitioner's] . . . confession was freely and voluntarily given and without coercion was correct." 561 P.2d at 1227; Appendix A, infra, at p. 4.

II. The Death Penalty Issue

Petitioner's contention that the death penalty provided by Ariz. Rev. Stat. Ann. §§ 13-453 and 13-454 is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments to the Constitution of the United States was also considered on the merits, and was rejected by the Arizona Supreme Court (561 P.2d at 1229;Appendix A, infra, at p. 6) in reliance upon that court's previous decision in State v. Richmond, ___ Ariz. __, 560 P.2d 41 (1976), which had sustained the statute under Gregg v. Georgia, 428 U.S. 153 (1976) and companion cases. "The fact that the judge instead of the jury imposes the sentence is without consequence. We addressed this issue in Richmond and found it to be without merit relying on Proffitt v. Florida, [428 U.S. 242 (1976)]." 561 P.2d at 1229 Appendix A, infra, at p. 6.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE COURTS BELOW HOLDING PETITIONER'S CONFESSION VOLUNTARY ON A THEORY THAT SUBSTANTIALLY ERODES THIS COURT'S DOCTRINES RELATING TO PROMISE-INDUCED CONFESSIONS.

Eighty years ago, the basic constitutional rules regarding the admissibility of promise-induced confessions were laid down in Bram v. United States, 168 U.S. 532 (1897):

> "'a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence. . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . . . ."(Emphasis added)

In this Court at least, there has been no subsequent retreat from those principles. See, e.g., Lynumn v. Illinois, 372 U.S. 528 (1963); Hutto v. Ross, 50 L.Ed.2d 194 (1976).

The decision below warrants review because it makes two crippling incursions upon the settled doctrines of Bram v. United States.

First, although the Arizona Supreme Court concedes that petitioner's confession was the product of a "deal" under which petitioner confessed to an Arizona crime in exchange for the dropping of Texas charges against himself and his girlfriend, the court holds (following a prior Kentucky decision) that this overtly promise-induced confession is immunized against constitutional challenge because petitioner "himself initiated the 'deal'." 561 P.2d at 1227; Appendix A, infra, at p.4. In other words, if the consideration which induces a confession looms so prominently in the confessor's mind that he raises the subject with

interrogating officers instead of vice versa, his subsequent confession bought by that consideration is eo ipso "voluntary."

Second, the Arizona Supreme Court not merely undertakes to "measure the force of the influence"[6/] upon petitioner of an interrogating officer's admitted statement of "opinion" that petitioner would not get the death penalty for the crime to which he was being asked to confess; the court also distorts the measuring process by the plainly impermissible procedure of abstracting this particular "opinion" of the officer from the context of "the entire record," Davis v. North Carolina, 384 U.S. 737, 741 (1966), so as to ignore its interaction with the promise to drop Texas charges. Plainly, in "the totality of all the surrounding circumstances," Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), the misleading comfort provided by an Arizona police officer's pronounced "opinion" that petitioner "more than likely . . . wouldn't get the death penalty" (T.(I)21) "because nobody had been sentenced to [death] recently that we knew of" (T.(II)68) affected petitioner's confession to an Arizona crime in exchange for nonprosecution in Texas. Yet that same confession made with the unmistakable understanding that it would secure his absolution from comparatively more threatening noncapital Texas charges is now held voluntary and admissible as the critical evidence which supports his death sentence in Arizona.

On this record, there can be no doubt (1) that, when first questioned about the Osso crime, petitioner "knew nothing," 561

6/ Bram v. United States, quoted supra.

P.2d at 1226; Appendix A, supra, at p.3;[7] (2) that petitioner subsequently insisted he would make no statement about the Osso crime unless"certain conditions were met" regarding the release of his girlfriend from custody and the dropping of Texas charges against his girlfriend and himself, 561 P.2d at 1226; Appendix A, infra, at p.3;[8] (3) that, while arrangements were being made to meet the conditions, petitioner specifically inquired of the Arizona officers whether they believed that he would get the death penalty in Arizona, and was assured by Lieutenant Christensen that he did not;[9] (4) that petitioner then met with the

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7/ More precisely, petitioner denied knowledge of the crime and told the Arizona interrogating officers that he did not wish to make a statement. T.(I) 20, 22, 37, 47; T.(II) 58, 112, 129.

8/ Petitioner specifically told the Arizona officers that, before he would discuss the Osso case, he wanted to talk about the dropping of the Texas charges against himself and his girlfriend, and his girlfriend's release from Texas custody. T.(I) 12, 23, 37-38; T.(II) 61, 63, 113.

9/ This discussion is described in the record at T.(I) 14, 23-24, 28-29, 36-38, 49; T.(II) 68, 115, 116, 132. The following excerpts of the testimony of Officers Schoenfeld and Christensen is representative:

> [State] Q Was there any mention or any discussion between yourself and Paul William Jorden [sic] or between Paul William Jordan and these other parties just mentioned regarding the type of sentence he might get in Arizona if he gave a statement?
> [Schoenfeld] A There was a discussion. He was asking our opinion and if they had a death penalty in Arizona.
> Q Would you tell us what the substance of that discussion was?
> A Lt. Christensen indicated to him that they, that we haven't had a death penalty in some time in Arizona, and he doubted, it was his own opinion, he made that clear, it was his opinion, he doubted very much that he would get the death penalty.

T. (I) 14.

> [Defense] Q What was he advised of what his sentences might be?
> [Schoenfeld] A Well, it was just a matter of opinion. Lt. Christensen was the one that made the statement when Jordan asked him if he would get the death penalty, whether Arizona still has the death penalty, and neither one of us could remember how long it had been since there had been a death penalty sentence.
> And Lt. Christensen said it was his opinion

Weatherford, Texas prosecutor, Mr. Tandy, pursuant to arrangements made by the Arizona officers; and, following this meeting, Mr. Tandy informed the Arizona officers that "everything

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9/ cont'd.

> that more than likely he wouldn't get the death penalty for this.
>
> Q All right. Now, were there any statements made to him in regards to time he would have to do if he received a life sentence?
>
> A I don't recall that at all, no.
>
> Q Was he advised that there were only two sentences that he could receive if he made his statement to this charge in Arizona?
>
> A I don't recall if the statement was made, but it probably was it would be just life or death.

T.(I) 23.

> [State] Q During those prior conversations, Lt. Christensen, was there ever any discussion regarding the possible sentence the defendant might receive?
>
> [Christensen] A Yes, sir.
>
> Q Did he ask you if he could get death?
>
> A Yes, sir, He did.
>
> Q Do you recall what your reply was?
>
> A My reply was I didn't think he would get death.

T.(I) 28.

> [Defense] Q Lieutenant, when was the first time you initially came in contact with Mr. Jordan in Texas?
>
> [Christensen] A About 3:45 P.M., May 1st.
>
> Q About how long was it before you came in contact with him and he made the tape-recorded statement?
>
> A Well, he gave his statement at, as I recall, 5:30, when he was advised on tape of his statement, roughly, around two hours, I guess.
>
> Q Now, it is during this two-hour period that the conversations took place between you and Detective Schoenfeld and Mr. Jordan and between Mr. Jordan, Mr. Tandy and Nancy Caldwell, is that correct?
>
> A That is correct.
>
> Q Now, during this time, it is your testimony that you gave Mr. Jordan your opinion that he would not receive the death penalty in Arizona?
>
> A That is correct, sir.

T.(I) 35-36.

> [Schoenfeld] THE WITNESS: He was asking us if Arizona still had a death penalty and we indicated

was squared away" so that petitioner would give them a statement;[10]

9/ cont'd. to him that they did. We told him that we couldn't recall any recent sentences of death recently. And there was some discussion to if he would -- I can't recall any others, other than the death penalty and Lieutenant Christianson [sic] indicating to him that it was his opinion -- or he asked him his opinion, Jordan did, and Lieutenant Christianson [sic] indicated: Well, it was his opinion more than likely he wouldn't get the death penalty due to the trend of things, and so forth, and that nobody had been sentenced recently that we knew of.

BY MR. SULLIVAN [Defense]

Q In other words, Mr. --

MR. TOLINO: Excuse me, your Honor, I don't believe I understood his last answer.

THE WITNESS: I stated that --

MR. TOLINO: Lieutenant Christianson [sic] said he would or would not?

THE WITNESS: Would not.

T.(II) 67-68.

[Defense] Did you tell him that he did face the death penalty?

[Schoenfeld] A We told him --no, we didn't tell him that he would face the death penalty. We told him that the death penalty was still in effect in Arizona, and that he would either get life or the death penalty; however, what Lieutenant Christianson[sic] told him --

Q All right.

And you say that Lieutenant Christianson [sic] indicated that it was his opinion that he would not get the death penalty?

A That's correct. . .

[Christensen] A He asked me if he would receive the death penalty -- if we had a death penalty. I told him we did, and he asked me if I thought he would get the death penalty, and I told him in my opinion I didn't think he would.

[Defense] Q Did you talk about a life imprisonment term?

A We spoke about a life imprisonment term, yes, sir.

Q Was there any mention of how much time Mr. Jordan would have to do if he was sentenced to life?

A I don't recall any specific time mentioned.

Q Was that subject talked about, how much time he would have to do in Arizona?

A He asked about life, but I don't recall any specific times and amount of years or impressions of years, what he would have to do in prison.

T.(II) 69, 116.

10/ T.(II) 64. Prior to petitioner's meeting with Mr. Tandy, he had been assured that Texas charges in several other localities would be dropped. T.(II) 131 (uncontradicted testimony of petitioner).

and (5) that petitioner then made the taped confession to the Osso crime which was admitted below as "voluntary."[11] Whether, under these circumstances, it was indeed voluntary merely because petitioner "initiated the 'deal'" and accepted the assurance of a police "opinion" instead of a firm commitment that he would not be sentenced to death, is a question that requires this Court's review if Bram v. United States is not be gravely undermined.

11/ T.(I) 35-36. We have noted at pages , supra, petitioner's testimony at the trial below that he understood he would receive a life sentence for the Arizona homicide, with an opportunity for parole in seven or seven and a half years. T.(I) 43-44; T. (II) 132, 144. He further testified that he made his confession only because of the promises that he had received, which caused him to expect more lenient treatment in Arizona than he would have had in the Texas prisons. T.(I) 45; T.(II) 142, 144.

II. CERTIORARI SHOULD BE GRANTED TO CONSIDER THE CONSTITUTIONALITY OF ARIZONA'S CAPITAL-SENTENCING PROCEDURES UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Several distinct but related questions regarding the federal constitutionality of Arizona's post-Furman death-sentencing scheme, as it was applied to condemn petitioner in the present case, merit consideration of this Court on certiorari:

A. The Failure Of The Arizona Death-Sentencing Procedures To Provide The Capitally Accused The Right To A Judgment Of His Peers As To The Existence Of Mitigating Circumstances, And The Appropriateness Of The Penalty Of Death.

Arizona proceedings for determining sentence on the finding or admitting of guilt in first degree murder cases are provided in Ariz. Rev. Stat. Ann. §13-454.Sec.13-454(A) provides that the judge who presided at trial or who received the plea shall conduct a separate sentencing hearing to determine the existence or nonexistence of the aggravating and mitigating circumstances set out in subsections (E) and (F) respectively. The hearing, for the purpose of determining the sentence to be imposed, shall be conducted before the court alone.

The court alone, under the evidentiary procedures specified in subsection (B), hears the evidence presented by the prosecution and defense and then under subsection (C) must return a special verdict setting forth its findings as to the existence or nonexistence of the circumstances enumerated in subsections (E) and (F). Finally, the court alone determines whether to impose a life sentence with minimum of 25 calendar years, or a death sentence. This determination is made under the standards set forth in subsection (D): the court shall impose a sentence of death if the court finds one or more of the aggravating circumstances in subsection (E) and finds there are no mitigating circumstances as enumerated in subsection (F).

The statutory death sentencing procedure just described excludes the jury totally from the process of life-or-death decision making in individual capital cases. Such exclusion raises significant questions under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution which this Court should grant certiorari to resolve. To avoid burdening the Court with repetitious matter, we incorporate by reference subpart (I)(B), pages 29-36 of the Petition for a Writ of Certiorari in McKenzie v. Montana, No. 76-6714, which raises a similar issue and underscores the importance of its consideration by the Court. The referenced pages are attached to this petition as Appendix B.

B. The Undue Limitation Of Consideration Of Mitigating Circumstances Relating To The History And Character Of The Offender Under Arizona's Rigid And Mechanical Offense-Centered Death-Sentencing Formula.

When a trial judge finds one aggravating circumstance under Subsection (E) and no Subsection (F) mitigating circumstances, the Arizona Supreme Court has ruled that imposition of the death penalty is mandatory.[12/] In the hearing to determine sentence, "[t]he burden of establishing the existence of any mitigating circumstance is on the defendant. A.R.S. §13-454(B)." State v. Ceja, supra, slip op. at 3. The defendant may not, however, present to the court the full range of circumstances which might mitigate the seriousness of the crime charged, since he is limited to evidence tending to establish one or more of the four "mitigating circumstances" set forth in Ariz. Rev. Stat. Ann. §13-454(F).

12/ "If the superior court finds one or more of the aggravating circumstances and no mitigating circumstances, it shall impose the sentence of death."

State v. Richmond, __Ariz.__, 560 P.2d 41, 53 (1976).

> "Under certain circumstances the trial court has no discretion in imposing the death sentence. A.R.S. §13-454, subsec. D calls for the imposition of the sentence of death whenever it is shown at the sentencing hearing that aggravating circumstances attended the murder and that no mitigating circumstances 'sufficiently substantial to call for leniency' exist . . .[w]e are satisfied that the aggravating circumstances were established and that no mitigating circumstances existed, so the death penalty was properly imposed in this case."

State v. Blazak, __Ariz.__, 560 P.2d 54, 61 (1976).

> " . . . we are satisfied that no mitigating circumstances were established. One aggravating circumstance was established. Under these circumstances, the imposition of the death penalty was not only proper but required. A.R.S. §13-454(D) . . . "

State v. Ceja, Ariz. Sup. Ct. No. 3102-2 (May 16, 1977), slip op. at 9.

The list is exhaustive, and a defendant may not offer evidence of any other extenuating circumstances. In State v. Richmond, the Arizona Supreme Court rejected the defendant's argument that because subsection (D) does not explicitly limit the number of mitigating circumstances, a judge is permitted to consider any mitigating circumstances. The court held "that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." State v. Richmond, supra, 560 P.2d at 50.

Moreover, the Arizona Supreme Court has construed the four statutory "mitigating circumstances" in a narrow and restrictive manner. In Richmond, it held that evidence that a defendant suffered from a character or personality disorder does not qualify as an "impairment" under Ariz. Rev. Stat. Ann. §13-454(F) (1).[13/] Although the statute explicitly provides that the mental "impairment" need not be such as to constitute a defense to prosecution, the court ruled that to qualify as mitigating evidence at the sentencing phase, psychiatric testimony must indicate that a defendant suffered from a "mental disease or defect which renders him unable to appreciate the nature or wrongfulness of his conduct." 560 P.2d at 48.

Conversely, the Arizona Supreme Court has liberally and expansively construed the definition of the enumerated aggravating circumstances. For example, in State v. Blazak, the court ruled that the shootings of a bartender and bystander in a bar holdup without

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13/ "[Defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution." Ariz. Rev. Stat. Ann. §13-454(F)(1).

any other showing of aggravation was "especially heinous, cruel, or depraved" sufficient to satisfy the requirements of Ariz. Rev. Stat. Ann. §13-454(E)(6), apparently because "no justification" for the shooting was shown. State v. Blazak, supra, 560 P.2d at 61 n.3.[14/]

The admissible evidence of mitigation in an Arizona capital trial relates only to the offense and not to the offender, since the four "mitigating circumstances" which may be shown are:

> "1. . . . [a defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution.
> 2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
> 3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

Ariz. Rev. Stat. Ann. §13-454(F). "Circumstances such as the youth of the offender, the absence of any prior convictions," Harry Roberts v. Louisiana, 45 U.S.L.W. 4584, 4585 (U.S., June 6, 1977), or valorous military service may not be shown, since these factors are not directly linked to the crime for which the defendant has been convicted. The statute forecloses consideration of the whole character of the defendant as a human being, and a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon

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14/ The Blazak decision is explicated in this way in State v. Ceja, supra, slip op. at 8, and State v. Knapp, Ariz. Sup. Ct. No. 3106 (Mar. 9, 1977) slip op. at 24.

him of a sentence of death," Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(plurality opinion), is therefore impossible. In State v. Ceja, supra, for example, the Arizona Supreme Court ruled that a defendant has failed to establish duress despite evidence that he had no history of violence, had had great difficulty in obtaining employment, and was "depressed or even traumatized by his wife's miscarriage", slip op. at 3, three months before the crime. This evidence was dismissed because it did not relate to "the day of the murders", ibid.

The Arizona statute simply does not allow "for consideration of whatever mitigating circumstances . . . [are] relevant either to the particular offender or the particular offense," Harry Roberts v. Louisiana, 45 U.S.L.W. 4584, 4585 (U.S., June 6, 1977) (emphasis added). See also Jurek v. Texas, 428 U.S. 262, 271 (1976). Because of its myopic consideration of mitigating circumstances, the Arizona statute "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass," Woodson v. North Carolina, supra, 428 U.S. at 304.

C. The Imposition of the Burden of Proving Mitigating Circumstances Upon the Capital Defendant.

Certiorari should also be granted to consider whether the Eighth and Fourteenth Amendments permit a State to cast upon a capital defendant the burden of proof of specified statutorily enumerated "mitigating circumstances" in order to save his life.

In the immediately preceding subpart, we have noted that Arizona law requires the imposition of the death penalty in any case of first degree murder where one or more of six aggravating circumstances is (or are) found, unless one or more of four mitigating circumstances is (or are) found and is (or are) found to outweigh the aggravating circumstances. The governing statute, Ariz. Rev. Stat. Ann. §13-454(B), explicitly provides that "[t]he burden of establishing the existence of the [mitigating] circumstances set forth in subsection F is on the defendant"; and the Arizona Supreme Court has made it plain that this burden is the full burden of persuasion. E.g., State v. Ceja, supra, slip op. at 3.

The federal constitutional question raised by this allocation of the burden of proof takes shape within the framework of the particular Arizona death-sentencing process as a whole. Unlike many other States, Arizona does not have an open-ended roster of "mitigating circumstances" as to which convenience might dictate that the burden of going forward (or even perhaps the burden of persuasion) should be cast upon a defendant who is on trial for his life. Arizona has a specific, statutorily-defined, narrow

and exclusive catalogue of "mitigating circumstances." There are only four of them. The prosecution is therefore put on notice what they are; and, because each of them is closely akin to an issue that is likely to arise at the guilt phase of the trial if the facts of any case call a mitigating circumstance into question (insanity or diminished capacity, duress, vicarious liability, and malice), the prosecution will ordinarily have investigated the facts and be prepared to offer proof on each of them. These are not broad issues of character, comparative culpability, penology or judgment unlike those that are the grist of the mill of the criminal process. They are issues of fact that involve precisely the same fact-finding processes and risks of error as the matters of fact that the traditions of Anglo-American law have long found it appropriate to require the prosecution to prove beyond a reasonable doubt. The only functional distinction is this: in a first degree murder case where one aggravating circumstance has been found, the determination of the existence of a mitigating circumstance spells the difference between a mandatory death sentence and chance for life.

The question, then, is whether such determinations, made for such a purpose in a criminal trial, can escape the command of the Constitution that the State which establishes any distinction of preponderant importance in the assessment of criminal culpability must "require the prosecution to establish beyond a reasonable doubt the fact[s] upon which it turns."

Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). That question surely deserves this Court's consideration in the light of its previous relevant pronouncements. "Because of [the] . . . qualitative difference [between a sentence of death and one of life imprisonment], there is a corresponding difference in the nee for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion). "The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error," In Re Winship, 397 U S. 358, 363 (1970); and is necessary to reduce the same risk in the infliction of the extreme penalty of death, as to which any avoidable error would be intolerable. See Gardner v. Florida, 51 L.Ed.2d 393 (1977). "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden [of proof] . . . beyond a reasonable doubt." Speiser v. Randall, 357 U.S. 513, 525-526 (1958). It can hardly be denied that the capital defendant has at stake an interest of the most transcending value known to humankind. Nevertheless, Arizona has decreed that he must bear the burden of proof of the facts on which his life depends, and must die even though it is as likely as not that those facts are true and that they warrant his salvation even under the narrow calculus of the Arizona statute.

D. The Arizona Practice Conferring Upon The Prosecuting Attorney An Uncontrolled And Arbitrary Discretion To Inflict Or Avert The Death Penalty In Any Case Of "Aggravating Circumstances".

In Woodson and Stanislaus Roberts, this Court recognized that unduly rigid death-sentencing schemes cannot practicably be enforced according to their letter, and that the discretion which they purport to deny to human sentencing agencies will inevitably be exercised extralegally and therefore all the more arbitrarily. So it is that "[i]nstead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman [v. Georgia, 408 U.S. 238 (1972)] . . . ," Woodson v. North Carolina, supra, 428 U.S. at 303 (plurality opinion) by compelling resort to "the arbitrary exercise of . . . de facto sentencing discretion" as the only outlet from the unacceptable rigors of a legislative prescription that demands death in cases where the death penalty is factually inappropriate, Stanislaus Roberts v. Louisiana, supra, 428 U.S. at 335 (plurality opinion).

We have demonstrated in subpart (II)(B) supra that the Arizona statute is indeed unduly rigid because it excludes from consideration in the sentencing process any mitigating characteristics of the offender excepting four exceedingly narrow circumstances that relate immediately to the moment and the nature of his offense. It is therefore unsurprising that an extralegal process has developed to take account of all of the other factors in a case which may make the death penalty unwarranted although legally required. What is surprising is that the Arizona Supreme

has explicitly sanctioned one aspect of this process which makes a visible laughingstock of the supposed "basic requirement [of Furman that] . . . arbitrary and wanton jury discretion [be replaced] with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," Woodson v. North Carolina, supra, 428 U.S. at 303 (plurality opinion).

In State v. Murphy, 113 Ariz. 416, 555 P.2d 1110 (1976), the defendant pleaded guilty to a charge of first degree murder in perpetration of a robbery, and the prosecutor (apparently pursuant to plea negotiations) declined to present any evidence of aggravating circumstances at the aggravation-mitigation hearing. Seeing that there were indeed statutory aggravating circumstances in the case, the trial judge ordered the prosecutor to introduce evidence of them. This the prosecutor did; and the trial judge -- strictly following the letter of the law (see pp. - supra) -- "concluded that one aggravating circumstance . . . had been proved and no mitigating circumstances existed; therefore he sentenced [Murphy] . . . to death." 555 P. 2d at 1111. The Arizona Supreme Court did not find that the statutory aggravating circumstance was factually unsupported. It did not find any mitigating circumstances. It did not dispute what it had elsewhere repeatedly held: that in any case where one aggravating circumstance and no mitigating circumstance is found, the death penalty must be imposed. State v. Richmond, supra;

State v. Blazak, supra; State v. Ceja, supra. However, it vacated Murphy's death sentence and "corrected" it to a sentence of life imprisonment, 555 P.2d at 1112, because:

> "[t]he decision to offer evidence of aggravation or not to offer such evidence is the responsibility of the prosecutor. The court has no authority to interfere with the discretion of the prosecutor in this area . . . .
>
> "We hold that the trial court was in error in directing the prosecutor to put on evidence of aggravating circumstances. The evidence offered as to the aggravating circumstances should not have been admitted. Without such evidence there was no proof of any aggravating circumstances, and the sentence of death was not proper." Ibid.

The point of Murphy could not be more blatant. The prosecutor's decision, which the Arizona Supreme Court held to be uncontrollable, was the decision of life or death for Murphy. Under Arizona "law," if the prosecutor had chosen to present evidence of aggravating circumstances (which in fact existed), the death penalty was not merely possible; it was required. If the prosecutor chose not to present the available evidence of aggravating circumstances, the death penalty was forbidden. Thus, the unbridled discretion which Furman forbade to both juries and judges[15/] is now reposed by Arizona law in the prosecuting attorney.

15/ Furman, of course, prohibits uncontrolled discretionary death-sentencing by judges as well as juries. See, e.g., Janovic v. Eyman, 408 U.S. 934 (1972)(per curiam); Davis v. Connecticut, 408 U.S. 935 (1972)(per curiam); Alvarez v. Nebraska, 408 U.S. 937 (1972)(per curiam); Morford v. Hocker, 408 U.S. 934 (1972)(per curiam); Fesmire v. Oklahoma, 408 U.S. 935 (1972)(per curiam); Phelan v. Brierly, 408 U.S. 939 (1972)(per curiam).

We recognize that in its Gregg, Proffitt and Jurek decisions, this Court held that Furman was not offended by "[t]he existence of . . . discretionary stages" anterior and posterior to the sentencing stage of a capital trial -- stages such as charging, plea bargaining, the degree-of-guilt determination, and executive clemency. Gregg v. Georgia, supra, 428 U.S. at 199 (plurality opinion). "Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense." Ibid. So does Murphy; and Murphy deals with nothing else.

The only difference between Arizona practice under Murphy and Georgia practice before Furman is that Arizona has deposited an identically unbridled life-or-death sentencing discretion, with at least as great a "risk of wholly arbitrary and capricious action," Gregg v. Georgia, supra, 428 U.S. at 189 (plurality opinion), in "a state officer outside the judicial system," Lane v. Brown, 372 U.S. 477, 485 (1963). That difference would hardly appear to be a saving grace under any rational constitutional dialectic, inasmuch as prosecutors are not generally supposed "to maintain the requisite neutrality" to make them better repositories of arbitrary power than courts. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). See, e.g., Baggett v. Bullitt, 377 U.S. 360, 373 (1964); Mancusi v. DeForte, 392 U.S. 364, 371-372 (1968); Shadwick v. City of Tampa, 407 U.S. 345, 350-351 (1972). Certiorari should accordingly be granted to decide whether Gregg and its companion cases permit a death-sentencing system to flout Furman in the way that Arizona's all-but-avowedly does.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

Appendix A

STATE of Arizona, Appellee,

v.

Paul William JORDAN, Appellant.

No. 3156.

Supreme Court of Arizona,
En Banc.

Dec. 30, 1976.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. 84940, Harold D. Martin, J., of first-degree murder, and he appealed. The Supreme Court, Hays, J., held that statement which was made by a police officer during questioning and prior to defendant's confession and which consisted of an opinion that defendant would probably get a life, as opposed to a death, sentence did not constitute a promise of leniency in circumstances, but even if it was perceived as such by defendant, where it was not relied upon by defendant in his decision to confess, statement was not a basis for concluding that defendant's confession was involuntary due to statement of police officer; further, death penalty imposed upon defendant was not improper under applicable statute nor was it constitutionally infirm.

Affirmed.

1. Criminal Law ⇐1130(2)

Although it was not raised in defendant's brief on appeal from conviction of first-degree murder, it was incumbent upon Supreme court, aside from contention that defendant's confession resulted from a promise that charges against him in another state would be dropped, to consider in addition whether defendant's confession resulted from what might be construed as a promise of leniency. A.R.S. § 13-1715[B].

2. Criminal Law ⇐517.1(1)

Admissibility of a confession is proper only when it is freely and voluntarily given and is not the product of either physical or psychological coercion.

3. Criminal Law ⇐520(5)

Promise by prosecutor that charges against defendant in another state would be dropped, having been solicited by defendant himself, did not operate to render defendant's confession involuntary.

4. Criminal Law ⇐1158(4)

Determination of admissibility of a confession by trial court will not be upset on appeal in absence of a clear and manifest error.

5. Criminal Law ⇐520(2)

Statement which was made by a police officer during questioning and prior to defendant's confession and which consisted of an opinion that defendant would probably get a life, as opposed to a death, sentence did not constitute a promise of leniency in circumstances, but even if it was perceived as such by defendant, where it was not relied upon by defendant in his decision to confess, statement was not a basis for concluding that defendant's confession was involuntary due to statement of police officer.

6. Criminal Law ⇐1206(3)

Statute outlining procedures to be followed in imposing the death penalty is applicable to a conviction for which, under law of Arizona, a maximum sentence of life imprisonment may be imposed. A.R.S. § 13-454.

7. Homicide ⇐354

Imposition of death penalty on conviction of first-degree murder was not improper under statutes in view of defendant's four prior convictions in other states for felonies which were punishable by a sentence of life imprisonment or death under law of Arizona and which involved use or threat of violence on another person. A.R.S. §§ 13-454[E, F], [E][1, 2], 13-642, 13-1644.

8. Criminal Law ⇐1213

Death penalty statute in Arizona does not allow death sentence to be imposed in an arbitrary and capricious manner and, hence, is not constitutionally infirm. A.R.S. § 13-454; U.S.C.A.Const. Amends. 8, 14.

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Bruce E. Babbitt, Atty. Gen. by William J. Schafer, III, and Frank T. Galati, Asst. Attys. Gen., Phoenix, for appellee.

Derickson, Kemper & Henze by James Hamilton Kemper, Phoenix, for appellant.

HAYS, Justice.

This is an appeal by Paul William Jordan from a conviction after jury trial for first degree murder. Appellant was sentenced to be punished by death. We have jurisdiction pursuant to Ariz.Const. art. 2, § 24 and art. 6, § 5; A.R.S. §§ 12-120.21, 13-1711; and 17 A.R.S. Rules of Criminal Procedure, rule 31.2(b).

The appellant was charged with the murder of the proprietor of a grocery store in Tempe, Arizona, that occurred during the course of a robbery on January 15, 1974. Two investigators had received information that appellant had something to do with the robbery and proceeded to interview the appellant after informing him of that fact. Within a matter of hours, the appellant confessed to the murder.

Appellant raises three issues on appeal:

1. Was appellant's constitutional right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution, denied by the introduction of his confession in evidence?
2. Did the trial court err in imposing the death penalty?
3. Was the appellant denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution, to be free from Cruel and Unusual Punishment, when he was sentenced to death under A.R.S. § 13-454?

I

Appellant first argues that his confession was involuntary, and as such was inadmissible in evidence. His argument is couched in terms of the voluntariness of a confession when induced by promises made to a defendant by police officers.

It appears from the record that the basis of the appellant's claim concerns two separate promises made by the authorities prior to the appellant's confession. The course of events which gives rise to this contention is as follows.

On May 1, 1974, while in custody in Texas, the appellant first maintained that he had no knowledge of the Tempe incident. Shortly thereafter, however, after talking with his girlfriend, Nancy Caldwell, he told the investigators that he would make a statement to them upon certain conditions. He stated that if the charges he was then facing in Texas were dropped and if the charges pending against Nancy Caldwell were dropped and she was released, he would then give a statement. The officers indicated that they had no authority to accomplish the results he sought, but they did offer to contact the Texas prosecutor in charge of the case concerning the dropping of charges. The investigators thereupon called the county district attorney, a Mr. Tandy, and arranged a meeting for later that day.

While waiting for Mr. Tandy to appear at the Weatherford Police Department, a conversation ensued between the Tempe police officers and Jordan in which Jordan asked the investigators whether Arizona had the death penalty. One of the officers replied to the effect that they could not remember the last time anyone received the death penalty in Arizona. They later ventured an opinion during the course of the conversation, that the appellant probably would get a prison sentence rather than the death penalty. However, he was also told at that time that this was only the officer's opinion and that ultimately his sentence was up to the judge and jury. Jordan admitted at the voluntariness hearing that a specific guarantee was never made to the effect that the most he would receive would be life.

A short while later, the prosecutor, Tandy, arrived and he and the appellant and Nancy Caldwell met in private. At the conclusion of the meeting, the appellant was willing to make a statement. He was again advised of his *Miranda* rights and he

thereupon confessed to the crime for which he was here charged. At the meeting the prosecutor, Tandy, had agreed to drop the Texas charges against both Ms. Caldwell and Jordan and to release Nancy Caldwell if the appellant made his statement to the Arizona authorities.

The trial court held a hearing on the voluntariness of the confession and found it to be voluntary. A jury trial was thereafter held and the confession, and testimony concerning the circumstances surrounding the giving of the confession, were offered in evidence.

[1] The appellant contends that his confession was the result of the promise that his and Nancy Caldwell's charges in Texas would be dropped. Although it was not raised in the appellant's brief, it is certainly incumbent on us to consider in addition, pursuant to A.R.S. § 13-1715(B) and *State v. James*, 110 Ariz. 334, 519 P.2d 33 (1974), whether the confession was the product of what may be construed as a promise of leniency, referring to the officer's statement that he would probably get life and not the death penalty.

[2] The admissibility of a confession is proper only when it was freely and voluntarily given and was not the product of either physical or psychological coercion. *State v. Edwards*, 111 Ariz. 357, 529 P.2d 1174 (1974).

> "While '[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved', the test remains the test of voluntariness. *Culombe v. Conn.*, 367 U.S. [568,] at 601, 81 S.Ct. [1860,] at 1878 [6 L.Ed.2d 1037]. If the confession is the result of a free choice of the individual, then it may be used as evidence against him, but if his will has been overborne and his capacity for decision diminished, then the use of his confession is violative of the principles of due process." 111 Ariz. at 361, 529 P.2d at 1178.

We find that the appellant here did make his confession freely and voluntarily and without coercion or under duress.

Addressing ourselves first to the promise by the prosecutor, Tandy, that Jordan's and Nancy Caldwell's charges would be dropped and that Caldwell would be released if he gave a statement, we note that it was the appellant himself who initiated the "bargaining." When first questioned, the appellant knew nothing. After talking with Caldwell, however, the appellant told the officers that he would give a statement if certain conditions were met. The officers cooperated in his desires but never made any offers to induce or coerce the appellant to talk.

We find the case of *Taylor v. Commonwealth*, Ky., 461 S.W.2d 920 (1970), to be instructive on this particular matter. In *Taylor*, the facts were very similar to those herein. The two defendants, charged with crimes in both Indiana and Kentucky, offered to make confessions of the Kentucky crimes if the charges against them in Indiana would be dismissed. The authorities agreed and the defendants signed their confessions. At trial they argued that their confessions, having been induced by a promise, were involuntary. The court disagreed, however, finding that, because the proposal for the "deal" came from the defendant, the promise did not interfere with the appellants' exercise of a free volition in giving the confession. The court then justified their conclusion.

> "In *Miranda v. Arizona*, 384 U.S. 436, the Supreme Court said (at page 478, 86 S.Ct. 1602, at page 1630, 16 L.Ed.2d 694):
>
> "' . . . Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . .'
>
> "We think it is obvious that the 'compelling influences' referred to are ones exerted by the *public authorities* in such a way as would be calculated to affect the accused's exercise of a free and voluntary choice of whether or not to confess. Here the promise was *solicited* by the accused, freely and voluntarily, so they cannot be heard to say that in accepting the promise they were the *victims* of compelling influences." 461 S.W.2d at

922. *Accord, Hunter v. Swenson*, 372 F.Supp. 287 (W.D.Mo.1974), *aff'd*, 504 F.2d 1104 (8th Cir. 1974).

[3] We agree with the analysis and holding of *Taylor*. Since the appellant himself initiated the "deal" here involved by offering to confess if the Texas charges were dropped, we cannot see how the appellant could have been induced to confess by the authorities' agreement to his terms.

> "The record reveals all the manifest indicia of comprehension of his rights, waiver thereof, and a continuing desire to make a statement. We do not have to plumb the depths of the defendant's mind to determine ab initio the issue of voluntariness. The police, as reasonable men, may rely on consistent objective manifestations of consent and waiver by a suspect." *State v. Sample*, 107 Ariz. 407, 408, 489 P.2d 44, 45 (1971).

We find that the promise not to prosecute in Texas, having been solicited by the appellant, did not render his confession involuntary.

A second "promise" arguably was made by the police during the questioning prior to the confession when one of the officers ventured the opinion that the appellant would probably get a life sentence in Arizona rather than the death penalty. Although the appellant admitted at the voluntariness hearing that no specific guarantees were made, he did insist in his testimony at trial that "he was under the impression" that he was promised, in so many words, that he would get a life sentence and therefore be eligible for parole in seven to seven and one-half years. He also claimed that his alleged "promise" was one of the reasons that he confessed.

[4] The trial court's determination of the admissibility of a confession will not be upset on appeal absent "clear and manifest" error. *State v. Edwards, supra*. The court below found the confession to be freely and voluntarily given and therefore admissible.

The statement concerning the sentence he might receive was couched in terms of a mere possibility. Although the record is unclear, it appears that it was made in response to the appellant's questioning the officers about possible sentences he would receive in Arizona. Moreover, the officer specifically told the appellant that this was merely an opinion and that the matter was ultimately up to the judge and jury.

More importantly, the statement was made during a conversation between the appellant and the investigators while they were waiting for the prosecutor, Mr. Tandy, to arrive. It was prior to that time that the appellant had freely decided that if he could get his and his girlfriend's charges in Texas dropped and get her released that he would make his confession. The decision and offer had already been made by Jordan. "If the person making the confession claims to have been coerced, the fundamental issue is his state of mind. *Miranda v. Arizona, supra*." *State v. Edwards, supra*, 111 Ariz. at 361, 529 P.2d at 1178. At this particular point in time, when the appellant had offered to confess if his demands were met, and the parties were merely waiting to obtain the Texas authorities' approval, the appellant's state of mind was such that his confession was imminent provided the Texas prosecutor agreed.

[5] We find that the officers' statements did not constitute a promise of leniency and that, in the alternative, even were it perceived as such by the appellant to be such a promise of leniency, it was not one relied upon by the appellant in his decision to confess. Based on this finding and on our prior finding concerning the promise to drop charges in Texas, and on a review of the entire record, we hold that the trial court's determination that appellant's confession was freely and voluntarily given and without coercion, was correct.

We further hold, based on our review of the entire record, that the verdict is clearly supported by the evidence.

II

Appellant next questions both the propriety of the imposition of the death penalty under A.R.S. § 13–454 and the constitutionality of the statute itself. We will first

consider his argument concerning the imposition of the death penalty under the procedures outlined in § 13–454. A hearing on aggravation and mitigation was held under A.R.S. § 13–454. The appellee submitted allegations of four prior convictions of appellant for felonies committed in the state of Texas. On cross-examination the appellant admitted to the prior convictions in open court and records thereof were attached as addenda to the original indictment in this matter. Appellant presented no evidence in mitigation at the hearing. The trial court found that as to aggravation there were one or more aggravating circumstances under subsection E of A.R.S. § 13–454, and no mitigating circumstances sufficiently substantial to call for leniency under subsection F of A.R.S. § 13–454. The court therefore ordered that appellant be sentenced to death.

[6, 7] Appellant argues that the four prior Texas convictions do not constitute aggravating circumstances within the provisions of A.R.S. § 13–454(E)(1) and (2). He first argues that none of the four crimes is punishable by a sentence of life imprisonment or death under Arizona law. The theoretical basis for his argument rests upon the premise that A.R.S. § 13–643 makes it impossible to impose a life sentence on a defendant in Arizona for robbery. Appellant was convicted of three separate robberies in Texas. A.R.S. § 13–643 specifies a minimum punishment without specifying a maximum punishment, with one exception. A.R.S. § 13–1644 states that a maximum punishment of life imprisonment is authorized where no limit to the duration of punishment is declared. A.R.S. § 13–643 does not prohibit the imposition of a maximum life sentence. The indeterminate sentence procedures were created by the legislature to make the punishment "fit the offender rather than the crime, ..." *Ard v. State*, 102 Ariz. 221, 427 P.2d 913 (1967). The parole board is thus given the function of determining the actual time to be served within the framework of the sentence. *See State v. Hays*, 109 Ariz. 123, 506 P.2d 254 (1973). We construe A.R.S. § 13–454(E)(1) to apply to a conviction for which, under Arizona law, a maximum sentence of life imprisonment may be imposed.

Appellant next argues that the record does not support the finding under A.R.S. § 13–454(E)(2) that he was convicted of a felony in the United States, involving the use or threat of violence on another person. The trial court, in its findings, concluded that appellant was previously convicted of felonies in the United States involving the use or threat of violence on another person. The record clearly supports such a finding by the trial court that appellant had been convicted of three felonies in Texas involving the use or threat of violence on another person. The crime of robbery as defined under Texas law involves either actual bodily injury to the victim, or the placing of another in fear of imminent bodily injury or death. Section 29.02, Vernon's Texas Codes Annotated. The verdict of guilt must therefore have necessarily included a specific finding that the appellant used or threatened violence on another and, accordingly, we hold that appellant was properly sentenced to death under A.R.S. § 13–454.

III

The appellant's final contention is that he was denied his rights under the Eighth and Fourteenth Amendments' proscription of cruel and unusual punishment relying on *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In *Furman*, the constitutional defect of the Georgia death penalty statutes was found to be that it allowed the jury to impose the death penalty in an arbitrary and capricious manner. The appellant argues that the Arizona death penalty statute, A.R.S. § 13–454, is similarly unconstitutional in that it allows a judge to arbitrarily impose the sentence of death. We cannot agree.

This court, in *State v. Richmond*, Ariz., 560 P.2d 41 (filed December 20, 1976), has upheld the constitutionality of the Arizona death penalty statutes in light of the most

recent United States Supreme Court pronouncements of *Gregg v. Georgia*, 423 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and its companion cases. The court in *Richmond* addressed the issue now before us and found that Arizona's statutory system for imposing the death sentence, based on aggravating and mitigating circumstances, insures that the trial judge is given "adequate information and guidance" that would meet the concerns expressed in *Furman*. Since the judge's discretion in sentencing is confined to narrow limits and because he is given purposeful direction and assistance under the statute, there is very little likelihood that the death penalty will be imposed freakishly or arbitrarily. Moreover, in Arizona, as was the case in Georgia (*see Gregg v. Georgia, supra*), "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia, supra*, 428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

The fact that the judge instead of the jury imposes the sentence is without consequence. We addressed this issue in *Richmond* and found it to be without merit relying on *Proffitt v. Florida*, 423 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

[8] Based on the foregoing, we hold that Arizona's death penalty statute, A.R.S. § 13-454, does not allow the death sentence to be imposed in an arbitrary and capricious manner and is therefore constitutionally firm.

Judgment of conviction and sentence are affirmed.

CAMERON, C. J., STRUCKMEYER, V. C. J., and HOLOHAN and GORDON, JJ., concur.

STATE of Arizona, Appellee,

v.

Robert Eugene SCHAEFER, Appellant.

No. 3634.

Supreme Court of Arizona,
In Banc.

March 2, 1977.

Defendant was convicted in the Superior Court, Maricopa County, Marilyn A. Riddel, J., of exhibiting a deadly weapon other than in self-defense, and he appealed. The Supreme Court, Struckmeyer, V. C. J., held that offense with which defendant was charged, assault with a deadly weapon could be carried out without an exhibition of weapon and, consequently crime of exhibiting a deadly weapon other than in self-defense was not an included offense within charge and was not a basis on which to convict defendant.

Reversed.

1. Criminal Law ⇐244

Submission of case on preliminary hearing transcript was not tantamount to a guilty plea under circumstances and, therefore, trial court did not err in failing to advise defendant of his privilege against self-incrimination and sentencing consequences of a finding of guilt.

2. Indictment and Information ⇐189(2)

Offense with which defendant was charged, assault with a deadly weapon, could be carried out without an exhibition of weapon and, consequently, crime of exhibiting a deadly weapon other than in self-defense was not an included offense within charge and was not a basis on which to convict defendant. A.R.S. 13-249, 13-916.

Bruce E. Babbitt, Atty. Gen., by William J. Schafer, III, Chief Counsel, Crane

Appendix B

B. Total Lack of Jury Participation in Capital Sentencing.

In the last ten years, Montana and a very few other States[35/] have reversed the historical evolution since the middle of the last century toward "jury sentencing in capital cases, McGautha v. California, 402 U.S. 183, 200 n.11 (1971), by removing the jury altogether from the sentencing process. Although this Court has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, 428 U.S. at 252 (plurality opinion), (emphasis added) it has neither considered nor approved a capital sentencing system which totally excludes jury participation in the life-or-death decision. The Court has allowed only one encroachment upon the jury's traditional sentencing power in a capital case: the power of a Florida trial judge to impose a death sentence where a jury's recommendation of life imprisonment is clearly unreasonable. See Proffitt v.

34/ cont'd.

v. Hough, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955).

35/ See Neb. Rev. Stat. §29-2522 (1973 supp.); Ohio Rev. Code Ann. §2929.03(C)(Page 1973 spec. supp.); Ariz. Rev. Stat. §13-454(A)(1974 supp.).

Florida, supra.[36] This precedent obviously does not resolve the constitutionality of Montana's procedure. The Court should review the question whether Montana's total exclusion of the jury from capital sentencing decision is consistent with the "evolving standards of procedural fairness in a civilized society," Gardner v. Florida, supra, 45 U.S.L.W. at 4277 (plurality opinion), "employed by the State to select persons for the unique and irreversible penalty of death," Woodson v. North Carolina, supra, 428 U.S. at 287 (plurality opinion) (footnote omitted).

Several considerations cast the gravest constitutional doubt upon this procedure:

First, the evolution of capital sentencing practice in this country, see Woodson v. North Carolina, supra, 428 U.S. at 289-299 (plurality opinion), has recognized jury participation in the decision whether life should be taken for a

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36/ The Court described Florida's sentencing system as follows:

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975).'

Proffitt v. Florida, supra, 428 U.S. at 248-249 (plurality opinion). In Florida, therefore, there is a substantial presumption that the jury's advisory sentence will, in fact, be imposed. See Gardner v. Florida, supra, 45 U.S.L.W. at 4278 (plurality opinion). In Montana, however, the jury plays no role in sentencing whatsoever.

capital crime as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). By the middle of the twentieth century, every American jurisdiction utilizing the death penalty had decided to "take from the judge the onus of inflicting capital punishment," United States v. Jackson, 390 U.S. 570, 576 n.12 (1968); Woodson v. North Carolina, supra, 428 U.S. at 291-292 (plurality opinion) and decided that if a capital "defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). See McGautha v. California, supra, 402 U.S. at 200 n.11; McElroy v. United States, 361 U.S. 249, 255 (1960)(dissenting and concurring opinion of Justice Harlan). The determination to include in the process of capital sentencing "a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in" executing a particular defendant, Humphrey v. Cady, 405 U.S. 504, 509 (1972)(footnote omitted), constitutes "a fundamental decision about the exercise of official power," and reflects "a reluctance to entrust plenary powers over . . . life . . . to one judge or to a group of judges." Duncan v. Louisiana, supra, 391 U.S. at 156.[37/] The reversal of that decision by

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37/ See, e.g., Bloom v. Illinois, 391 U.S. 194, 202 (1968); Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463-466 (1971); Taylor v. Hayes, 418 U.S. 488, 501-503 (1974). And see Groppi v. Leslie, 404

Montana and a few other States is clearly "attributable to diverse readings of this Court's multi-opinioned decision in" Furman, Woodson v. North Carolina, supra, 428 U.S. at 299 (plurality opinion), rather than to a "sudden reversal of societal values regarding the imposition of capital punishment," id. at 298.

Second, jury participation in sentencing has traditionally assured a "'link between contemporary community values and the penal system,'" Woodson v. North Carolina, supra, 428 U.S. at 295 (plurality opinion), "without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101," Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968). Sentencing juries provide the most "direct source of information reflecting the public's attitude toward capital punishment," Furman v. Georgia, 408 U.S. 238, 439-440 (1972) (dissenting opinion of Mr. Justice Powell); and see Gregg v. Georgia, supra, 428 U.S. at 181-182 (plurality opinion); their judgments reveal that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra,

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37/ cont'd.

U.S. 496, 504-506 (1971). When life is at stake, jury sentencing "'places the real direction of society in the hands of the governed . . . and not in . . . the government,'" Powell, Jury Trial of Crimes, 23 WASH. & LEE L. REV. 1, 5 (1966) (citing DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Reeve transl. 1948)).

428 U.S. at 296 (plurality opinion), and that "this most irrevocable of sanctions should be reserved for a small number of extreme cases," Gregg v. Georgia, supra, 428 U.S. at 182 (plurality opinion). Trial judges, on the other hand, because of their education, training and relative insulation are particularly poor repositories of "contemporary community standards" and have historically been significantly more willing than juries to impose the death penalty.[38/] The jury and the legislature are the two crucial "indicators of evolving standards of decency respecting the imposition of punishment in our society," Woodson v. North Carolina, supra, 428 U.S. at 293 (plurality opinion), and only the jury is "directly involved," Gregg v. Georgia, supra, 428 U.S. at 181 (plurality opinion), and able to bring those standards to bear on the facts of a particular case. At a time when society has rejected "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,'" Roberts v. Louisiana, supra, 428 U.S. at 333 (plurality opinion) the jury's Eighth Amendment judging function is vitally necessary inasmuch as its voice is uniquely "that of the

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38/ See KALVEN & ZEISEL, THE AMERICAN JURY 436, 306-312 (1966).

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penalogists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally

society against which the crime was committed," Williams v. New York, 337 U.S. 241, 253 (1949)(dissenting opinion of Justice Murphy).

Finally, Montana's procedure of holding the mitigation hearing before the trial court deprives a capital defendant of his right to have a jury find facts which determine whether he lives or dies.[39] Constitutional protections apply not only to procedures which determine "guilt or innocence but also

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38/ cont'd.

> jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10)(1968) at 64. See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) at 21-40.

39/ The verdicts returned by the jury found petitioner guilty of "deliberate homicide by means of torture" and "aggravated kidnaping" which had caused the death of the victim. T. 2605. The jury was at no point informed by the trial court that the consequences of these verdicts -- unless the court found "mitigating circumstances"-- would be the execution of petitioner, and its factual determinations were not dispositive with regard to the sentencing issues which the trial judge ultimately resolved. The jury made no findings whether the crimes for which it convicted petitioner were sufficient to justify the death penalty or whether there were countervailing "mitigating circumstances" present, and it had no chance to evaluate the contents of the presentence report and the testimony and argument presented at the mitigation hearing.

. . . [to those which affix] the degree of criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 697-698 (1974). See Gardner v. Florida, supra. Montana has determined that only some deliberate homicides are to be punished with death. It is the necessity of making new factual findings in aggravation and mitigation[40/] which triggers petitioner's rights to a jury determination, at least of these factual questions if not of the ultimate question of punishment, at this second stage of the proceedings. For the Montana death penalty statutes do "not make the commission of a specified crime the basis for sentencing. [They] . . . mak[e] . . . [the] conviction the basis for commencing another proceeding . . . to determine whether a person constitutes a threat of bodily harm to the public" sufficient to justify execution. Specht v. Patterson, 386 U.S. 605, 608 (1967). Not all factors affecting criminal sentencing determinations must be decided by a jury,[41/] but Mullaney v. Wilbur, supra, and Gardner v. Florida, supra, stand for the proposition that where the determination of certain factors is of crucial significance -- where they "may be of greater importance than the difference between guilt or innocence for many lesser crimes" --

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40/ Although the trial court's statutory directive was simply to determine whether "mitigating circumstances" existed, the bulk of Judge Nelson's findings in this case concerned the existence of aggravating factors other than the "torture" which the jury had found to accompany the deliberate homicide. See Appendix B, infra.

41/ Cf. Specht v. Patterson, supra, and Townsend v. Burke, 334 U.S. 736 (1948), with Williams v. Oklahoma, 358 U.S. 576 (1959); and Williams v. New York, 337 U.S. 241 (1949).

the State may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment." Mullaney v. Wilbur, supra, 421 U.S. at 698.[42/] This Court should therefore determine whether petitioner had a constitutional right to a jury's factual evaluation of the propriety of the death penalty before the ultimate penalty was imposed by the trial court.

C. Unreliability of the Factual Predicate of of Petitioner's Death Sentence.

This Court has recognized that "[b]ecause of [the] . . . qualitative difference [between the death penalty and a sentence of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion) (footnote omitted). Because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically

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42/ Judge Friendly held in United States v. Kramer, 289 F.2d 909 (CA2 1961), that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge." Id. at 921. The aggravating circumstance involved in Kramer (the fact that embezzled commercial paper exceeded $100 in value) raised the crime from a misdemeanor to a felony. Id. at 920. The Kramer principle "is now well recognized. United States v. DeVall, 462 F.2d 137, 142 (CA5 1972).